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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-413

LOUIS J. POMPONIO, JR., *Petitioner*

v.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 3, 1975, Petition for Re-hearing was denied on August 15, 1975.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and is attached to this Petition (Petitioner's Appendix 1a-6a). The Order denying the petition for re-hearing and Re-hearing En Banc is attached (Petitioner's Appendix 6a-7a).

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 3, 1975 and Petition for Rehearing was denied on August 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. SHOULD NOT THIS COURT GRANT CERTIORARI AND REMAND THIS CAUSE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH DIRECTIONS TO CONSIDER THE PETITIONER'S ARGUMENT THAT THE EVIDENCE ON THE FIRST THREE COUNTS OF THE INDICTMENT WAS AT SUCH VARIANCE WITH THE CHARGES THAT AS A MATTER OF LAW A JUDGMENT OF ACQUITTAL IS REQUIRED AND THE EVIDENCE AS TO COUNT IV WAS INSUFFICIENT AS A MATTER OF LAW; AND DOES NOT A FAILURE OF THE COURT OF APPEALS TO DECIDE THESE ISSUES SUBJECT THE PETITIONER TO A RETRIAL IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY?

II. IS IT NOT A DENIAL OF DUE PROCESS BY FAILING TO INSURE A FAIR AND IMPARTIAL TRIAL WHEN THE UNITED STATES COURT OF APPEALS FAILED TO CONSIDER PETITIONER'S ARGUMENT THAT THE PREJUDICIAL REMARKS AND CONDUCT OF THE TRIAL JUDGE DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL WHEN AT THE SAME TIME THE COURT REVERSED ON OTHER GROUNDS AND REMANDED FOR A NEW TRIAL TO THE SAME TRIAL JUDGE?

STATUTES AND RULES INVOLVED

Rule 29. Motion for Judgment of Acquittal.

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant

or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Fifth Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 § 2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances, June 25, 1948, c. 646, 62 Stat. 963.

18 § 2314. Transportation of Stolen Goods, Securities, Moneys, Fraudulent State Tax Stamps, or Articles Used in Counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, secur-

> ities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or * * *

STATEMENT OF THE CASE

The Petitioner, Louis J. Pomponio, Jr., was indicted on a 14-count indictment with three other codefendents, Paul Pomponio, Peter Pomponio and Charles J. Piluso (Petitioner's Appendix 7a-21a).

Prior to commencement of the trial, the Government elected to proceed to trial on only 10 of the original 14 counts. At the conclusion of the prosecution's case, the Court merged into one count the first five counts, charging mail fraud, and likewise merged into one count, counts eight and nine, charging wire fraud.

The trial continued on a five count indictment. Counts in the original indictment were dropped and renumbered.

Count I of the indictment charged a general scheme to defraud, named the Petitioner and the other codefendants as general participants in an overall scheme to defraud with the implementation of the mails in furtherance of the scheme. This Count, which involved all of the defendants, accounted for ninety percent of the evidence offered at the trial.

Count II of the indictment charged the Petitioner and the other three defendants with violating Title 18. Section 2314, of the United States Code by causing one Albert Ginsberg to travel in interstate commerce in furtherance of the scheme to defraud which was outlined in Count I and which was incorporated by reference in Count II.

The third Count of the indictment also incorporated the scheme to defraud alleged in Count I and charged a violation of Title 18. Section 1343, asserting that Petitioner and codefendants used the phone in furtherance of the scheme to defraud.

Count IV of the indictment (old Count 11 of the Appendix) charged the Petitioner and the other three defendants with interstate transportation of a security, a two million dollar check, obtained by fraud in violation of Title 18, Section 2314 of the United States Code.

The Petitioner and codefendant Charles J. Piluso were convicted on all four counts. The codefendants Paul Pomponio and Peter Pomponio were convicted on Count IV.

Count V of the indictment was held to be insufficient on its face and was dismissed "without prejudice to the Government to reindict and retry if it chooses" by the United States Court of Appeals for the Fourth Circuit.

The Petitioner Louis J. Pomponio, Jr., moved pursuant to Rule 29 of the Federal Rules of Criminal Procedure for a judgment of Acquittal re-argued on appeal the improprieties of the conduct and remarks of the trial judge, the material and prejudicial variance

of the evidence from the Indictment, the insufficiency of the evidence, and the failure of the trial judge to properly instruct the jury.

The United States Court of Appeals for the Fourth Circuit reversed the conviction of all the defendants for the failure of the trial judge to make requested inquiries of the jury concerning prejudicial newspaper articles that appeared during the course of the trial and the Court of Appeals expressly declined to consider the Petitioner's appeal to that Court that the evidence as offered constituted a fatal variance from the charges of the indictment as drawn, failed to consider the insufficiency of the evidence, and failed to consider the conduct and remarks of the trial judge that denied the Petitioner a fair and impartial trial.

Petition for Rehearing was timely filed and denied on August 15, 1975. This Petition follows.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE REFUSAL OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO REVIEW THE EVIDENCE ON THE FIRST THREE COUNTS OF THE INDICTMENT AS BEING AT VARIANCE WITH THE CHARGES AND THE FAILURE TO REVIEW THE SUFFICIENCY OF THE EVIDENCE AS TO COUNT IV OF THE INDICTMENT, SUBJECTS THE PETITIONER TO A RETRIAL OF ALL FOUR COUNTS IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AGAINST DOUBLE JEOPARDY AND FAILS TO FULFILL THE STATUTORY DUTY IMPOSED ON THE COURT OF APPEALS UNDER TITLE 28, SECTION 2106 OF THE UNITED STATES CODE.

The Petitioner moved for a judgment of acquittal at the close of the Government's case, and after he rested his own case in the trial court. The Petitioner

raised in the United States Court of Appeals for the Fourth Circuit as his main point of appeal the material variance of the evidence from Counts I, II, and III of the indictment and the insufficiency of the evidence as to Count IV of the indictment.

The United States Court of Appeals for the Fourth Circuit awarded the Petitioner and the codefendants a new trial and stated (Pet. App. 2a):

> "The Defendants raised numerous issues including newspaper publicity during the trial prejudicing the jury, and insufficiency of the indictment on Count V. Since we reverse and remand for a new trial on the basis of the failure of the District Court to inquire of the jury concerning prejudicial publicity during the trial which may have reached them, we reach none of the multitude of other issues raised except the sufficiency of Count V of the indictiment."

Among the "multitude of other issues" was the signal and main issue of the Petitioner Louis J. Pomponio, Jr. that the evidence was at variance with the indictment and as such a new trial on the indictment when compared with the evidence is erroneous. This objection would not be cured with a new trial. A new trial would take place on the same indictment and presumably the same evidence and the same basic objection would still exist.

The Government's case was based on evidence directed toward separate and unrelated schemes to defraud; it did not prove the alleged in the indictment.

Each scheme may have had a similar goal, that of raising funds for the Pomponio business, the goals were not common and the parties to each transaction were different.

Neither Congress nor the Supreme Court ever "intended to authorize the Government to string together, for common trial, * * * separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that (two men) participated in all." *Kotteakos* v. *United States,* 328 U.S. 750, 773 (1946). The existence of multiple schemes with multiple defendants requires that the trial court carefully instrust the jury on the treatment of multiple schemes. *Kotteakos* v. *United States, supra; United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969).

The first three counts of the indictment involved the same common scheme, and the Trial Court instructed the jury on a "common plan or arrangement" (Tr. 2801-2802). Yet the evidence was directed to a series of separate schemes involving at least six parties, not all of whom were common to each scheme. Failure to instruct on multiple conspiracies has been held to be error where there was a common nucleus of conspirators and separate co-conspirators involved in each separate conspiracy. *United States* v. *Varelli,* 407 F.2d at 746-747; *Kotteakos* v. *United States, supra.*

In *United States* v. *Goss,* 329 F.2d 180 (4th Cir. 1964), where there were multiple conspiracies without a common interest or common confederate, this Court recognized the peril to defendants in the charge to the jury when the evidence reveals more than one conspiracy in a single count indictment. *Id.* at 184.

In this case, as in *Kotteakos, Goss* and *Varelli,* "no two of (the) agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or re-

sult. On the contrary, each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects." *Blumenthal* v. *United States,* 332 U.S. 539, 558 (1947).

Prejudice to the defendants may result in any case in which multiple conspiracies are charged as a single scheme. In *United States* v. *Russano,* 257 F.2d 712 (2nd Cir. 1958) the indictment charged a single conspiracy and the proof established two separate conspiracies, and the Second Circuit held the variance to be prejudicial and reversed. In *United States* v. *Buonomo,* 441 F.2d 922 (7th Cir. 1971), where there were two conspiracies with two of the parties as common nuclei and four others, some involved in one of the conspiracies and some in the other, but not all involved in both, the Seventh Circuit found *Kotteakos, supra,* controlling. *Id.* at 926; see also *Rocha* v. *United States,* 288 F.2d 545 (9th Cir.), *cert. den.,* 366 U.S. 948 (1961); *Barnard* v. *United States,* 342 F.2d 309 (9th Cir. 1965).

A procedure was established in the trial court and likewise in the Petition herein and the companion Petition filed by codefendants Paul Pomponio and Peter Pomponio, that a motion or objection made on behalf of one defendant would be considered applicable to the extent relevant to the other defendants and a ruling by the trial court as to any one defendant would be applicable to the other defendants (e.g., Tr. 2504).

The Petitioner suggests to this court that the refusal of the United States Court of Appeals for the Fourth Circuit to address itself to the argument of legally

insufficient evidence with respect to Count IV and awarding Petitioner a new trial subjects the Petitioner to a re-trial in violation of his constitutional rights against double jeopardy and not having answered this question permits the same errors to be made a second time.

The three Pomponio brothers executed a promissory note payable to the order of the Continental Bank in Philadelphia (Government Exhibit 106). This note was guaranteed personally by John McShain (*Ibid.*). A check in the amount of two million dollars payable to the order of Louis J. Pomponio, Jr., Peter and Paul Pomponio was then delivered by the Continental Bank to the defendants (Tr. 293, 1316-1317; Government Exhibit 86). Each of the Pomponio brothers endorsed this check to the order of National Realty and Construction Company (Tr. 384). The check was then delivered to the accountant, H. Burton Bates, who caused it to be deposited to the account of the National Realty and Construction Company, Inc. (Tr. 293-294).

On the books of National Realty, there existed loan accounts for the defendants in various amounts (Tr. 279). A large portion of the two million dollars was shown on the books of National Realty as constituting reimbursement to National Realty from the defendants for the advances which National Realty had earlier made to them (Tr. 295, 409). In short, funds borrowed personally by the defendants were used for the purpose of paying debts which they had personally incurred to their corporation. These reflected "advances" made to them during prior periods.

Separate and apart from the method in which this transaction was handled on the books of National Realty was the evidence of what was done with the

actual dollars which National Realty now found that it had in its account. With those dollars, the evidence reflects, National Realty paid a large variety of obligations which it had incurred to the Internal Revenue Service (Tr. 2210; Def. Ex. 46, 47), suppliers, subcontractors and the like (Tr. 2216; Def. Ex. 52).

From an accounting point of view, it was plain that the infusion of this two million dollars into the business had the consequence of eliminating from the balance sheet of National Realty a large amount of accounts payable as well as a large amount of receivables due from officers, directors or shareholders. Even to an accounting freshman this would constitute the "dressing up" of the statement which had been referred to during the negotiations with McShain (Gov. Ex. 73).

After the Pomponios had encountered financial problems and were unable to make satisfactory payments on the note, on or about February 5, 1973 the Continental Bank instituted suit in the United States District Court for the Eastern District of Pennsylvania. On December 4, 1973 a judgment was entered against Louis J., Peter and Paul Pomponio personally in the amount of $2,186,671 for the principal, unpaid interest and costs (Def. Ex. 44; see generally Tr. 1323); and the claims of the Pomponios against McShain remained to be determined (Tr. 1401-1403).

II. IT IS A DENIAL OF DUE PROCESS BY FAILING TO INSURE A FAIR AND IMPARTIAL TRIAL WHEN THE UNITED STATES COURT OF APPEALS FAILED TO CONSIDER PETITIONER'S ARGUMENT THAT THE PREJUDICIAL REMARKS AND CONDUCT OF THE TRIAL JUDGE DENIED PETITIONER A FAIR AND IMPARTIAL TRIAL WHEN AT THE SAME TIME THE

COURT REVERSED ON OTHER GROUNDS AND REMANDED FOR A NEW TRIAL TO THE SAME TRIAL JUDGE.

The brief filed on appeal to the United States Court of Appeals for the Fourth Circuit presents many documented arguments relating to the prejudicial comments made by the trial judge, the failure of the trial judge to properly instruct the jury and numerous errors relating to the admission of evidence introduced by the Government, exclusion of evidence attempted to be introduced by the Defense, a failure to conduct a proper *voir dire* and a denial of Defense Counsel to cross-examine the Government's witnesses.

Considerable reliance was made by the Government on certain charts introduced into evidence.

It is here, as in the Circuit Court, asserted that the method in which these charts were treated is as follows:

(1) They were placed into the hands of the jurors before their accuracy was tested and established; and

(2) The manner in which they were dealt with and the comments which were made with respect to them by the trial judge imported to them an importance and reliability which his caveats and admonitions (Tr. 895-896, 914-915) could never dispel.

In addition to Defense Counsel exposing that the charts did not in fact refer to the Government Exhibits in accordance with the representations which had been made in that regard concerning them, the cross-examination of the I.R.S. agents testifying about these charts, also indicated that the charts contained numerous errors in substantial amounts and also some rather cavalier adjustments spread over different fiscal years. The deficiencies of the charts and the prejudi-

cial comments of the trial judge are amply demonstrated and shown in the trial transcript at pages 1552 to 1600.

Repeatedly the trial judge reminded the jury that Defense Counsel had relied upon the assistance of two accountants to help design his course of examination (Tr. 952, 958, 968, 1553, 1554, 1559, 1569, 1572, 1579), but never mentioned to the jury that the charts and the Government's audit had taken the combined efforts of as many as thirty highly skilled and carefully trained I.R.S. agents over a period of approximately two years.

It is fundamental that charts should not be admitted unless there is competent and supporting evidence in the record on which to base them. *Lloyd* v. *United States,* 226 F.2d 9, 16-17 (5th Cir. 1955). The charts in this case are based partly on the Pomponio records which were never admitted in evidence and do not in any event plainly support them, and upon agents' work papers which were likewise never admitted into evidence. And thus the 18 charts, which went into the jury room at the conclusion of the trial, became the primary evidence. They were permitted to acquire "an existence of their own, independent of the evidence which gave rise to them." *Holland* v. *United States,* 348 U.S. 121, 128 (1954). And to compound the evil, they were the only pieces of evidence where a separate copy was provided each juror. This procedure is in manifest violation of the rules laid down for the use of charts in criminal cases, and requires reversal of the convictions below. *Holland* v. *United States, supra; Lloyd* v. *United States, supra; Steele* v. *United States,* 222 F.2d 628 (5th Cir. 1955); see also *Baines* v. *United States,* 426 F.2d 833, 839-840 (5th Cir. 1970).

CONCLUSION

This Petition presents constitutional issues of such magnitude that they reach the very heart of the judicial process concerned with criminal prosecutions. If these matters are left unresolved and unfettered, the fundamental Constitutional protections would be denied to the Petitioner.

The refusal of the United States Court of Appeals for the Fourth Circuit to decide the questions raised in the Petitioner's Brief on appeal, not only has subjected the Petitioner to a retrial in violation of the double jeopardy provisions of the Fifth Amendment, but has also subjected the Petitioner to a re-trial wherein the same procedural and prejudicial errors would ecur.

A decision by the United States Court of Appeals for the Fourth Circuit on the issues raised would be dispositive of the fundamental rights accorded to the Petitioner under the Constitution. If the decision of the Court of Appeals is allowed to stand, the Petitioner would be subjected to double jeopardy, and would also be denied due process of law unless the issues raised before the United States Court of Appeals for the Fourth Circuit are decided prior to the commencement of a new trial.

For the foregoing reasons this Court should grant this Petition for a Writ of Certiorari.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1690

UNITED STATES OF AMERICA

Appellee

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES PILUSO

Appellants

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued January 9, 1975 Decided June 3, 1975

Before RUSSELL, FIELD, and WIDENER, Circuit Judges

Albert J. Ahern, Jr., for Appellants Peter Pomponio and Paul Pomponio; Alan Y. Cole (Lee A. Schutzman and Cole and Groner on brief) for Appellants Louis J. Pomponio, Jr., and Charles J. Piluso; Thomas K. Moore, Assistant United States Attorney (David H. Hopkins, United States Attorney, Frank W. Dunham and Justin W. Williams, Assistant United States Attorneys, on brief) for Appellee.

WIDENER, Circuit Judge:

Peter, Paul, and Louis Pomponio are brothers who were business associates involved in the development, construction, and operation of high-rise office and apartment buildings in the District of Columbia-Northern Virginia area. Charles Piluso was their attorney. The four were indicted on September 24, 1973 on several counts of fraud and conspiracy to commit fraud. The indictment was superseded by another Grand Jury indictment on November 13, 1973. As required by the trial court and prior to trial,

the government dropped four counts. The case went to trial on January 21, 1974. At the close of the government's case, the court merged various counts and renumbered them. Count 1 charged mail fraud in violation of 18 USC § 1341; count 2 charged that the defendants caused a victim to travel interstate in execution of a scheme to defraud him in violation of 18 USC § 2314; count 3 charged that the defendants used telephone communication in interstate commerce in executing the scheme to defraud in violation of 18 USC § 1343; count 4 charged interstate transportation of a security obtained by fraud in violation of 18 USC § 2314; and count 5 charged interstate transportation of counterfeit securities in violation of 18 USC § 2314.

Defendants Piluso and Louis Pomponio were convicted on all five counts. Defendants Peter Pomponio and Paul Pomponio were found guilty of counts 4 and 5, found not guilty on counts 2 and 3; and the jury hung on count 1, which was then dismissed by the court as to Peter and Paul Pomponio.

The defendants raise numerous issues, including newspaper publicity during the trial prejudicing the jury, and insufficiency of the indictment on count 5. Since we reverse and remand for a new trial on the basis of the failure of the district court to inquire of the jury concerning prejudicial publicity during the trial which may have reached them, we reach none of the multitude of other issues raised except the sufficiency of count 5 of the indictment.

The defendants were businessmen in the area who had been involved in several large building projects, and the collapse of their considerable businesses amid charges of fraud attracted publicity in the press. As might be supposed, as this trial progressed, articles appeared on a regular basis reporting its progress, two of which are in issue here. The jury was not sequestered during the

trial, but were instructed each evening before they left for the night to read, listen, or look at nothing concerning the case outside the courtroom.

On January 24, 1974, an article appeared in *The Washington Post* which had a headline stating "Rent Signatures Held Forgery" and a smaller headline stating "U.S. Official Testifies Against Pomponios." The body of the article contained information that was not available to the jury in court. It disclosed that the current trial was for only the first 10 of 113 counts against the Pomponios stemming from the disintegration of their conglomerate "in 1972 under tax and money manipulation investigations." It also reproduced a comment by a "court officer" who "apparently bored by the lengthy arguments over the fine legal points, grumbled afterward, 'You'd think they were trying Al Capone'."

On the morning the article appeared, the attorneys presented it to the court and requested that the court inquire of the jury as to whether they had read the article. The court refused the request on the basis that the jury had been admonished on the evening before and every evening not to read any such articles.

On January 30, 1974, the second article at issue appeared in *The Washington Post.* It was headlined "Spat Ends Pomponio Defense" and was continued on another page with the headline "Pomponio Defense Rests as Two Refuse to Testify." The article contained an account of some testimony and facts surrounding the defendants. More importantly, it had an account of events that occurred in the courtroom while the jury was absent. The article related that the attorneys for defendants Peter and Paul Pomponio requested that defendants Piluso and Louis Pomponio be called as witnesses, and that they had refused. It also contained an abbreviated account of an exchange between the court and counsel.

On the morning this second article appeared, the defense lawyers presented it to the court and asked that the jury be polled to determine whether any of them had read the article. Again, the court refused.[1]

The defendants argue that both articles were prejudicial in nature and that there was an obvious possibility that the jury had read them. They argue that it was error for the court not to question the jury as to those articles brought to the court's attention. We agree. *United States* v. *Hankish,* 502 F.2d 71 (4th Cir. 1974).

The articles dealt with matters that could not have been raised before the jury. The refusal to testify of two of the defendants on the request of the other two was not a proper matter to bring to the jury's attention. *Griffin* v. *California,* 380 US 609 (1965). The existence and number of other pending charges could not have been raised even if the defendants had chosen to take the stand. *United States* v. *Pennix,* 313 F.2d 524 (4th Cir. 1963). See *Lovely* v. *United States,* 169 F.2d 386 (4th Cir. 1948). We express no opinion on the comparison of this trial to that of Capone, but note that the statement read in context probably expresses merely the thought that there was an uncalled for overemphasis on the importance of the proceeding. Information denied the jury in the courtroom due to its prejudicial nature is still prejudicial although it may reach the jury through news accounts. *Marshall* v. *United States,* 360 US 310 (1959).

The district court did not find that the articles were not prejudicial. Rather, it relied on its admonitions to the jury to refrain from reading any articles concerning the trial

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[1] There was apparently a third article that the defense wanted the court to inquire about. The request took place in chambers off the record, but the record does reflect that the court may have refused it. Since no attempt was made to place that article in the record, we do not consider whether the denial, if any, was proper.

of the defendants. While we agree that a jury is presumed to follow the court's instructions, when "highly prejudicial information may have been exposed to the jury, the court must ascertain the extent and effect of the infection, and thereafter, in its sound discretion, take appropriate measures to assure a fair trial." *Hankish,* p. 77 . Such articles must be brought to the court's attention, as these were by the attorneys, to enable it to make an initial determination as to whether the information is in fact prejudicial, and, of course, nonprejudicial articles do not require such an inquiry to the jury by the court. See *United States* v. *Wenzel,* 311 F.2d 164, 170 (4th Cir. 1962), *Hankish,* p. 77. Here, however, both articles contained prejudicial matter which the jury had no right to consider. When they were brought to the attention of the district court, it should have inquired how many, if any, of the jurors had read them, and if any had, taken such further steps as are required by *Hankish.* Its failure so to do requires a new trial.

The defendants raise in this court for the first time the contention that count 5 [2] is fatally defective for failing to charge an offense under 18 USC § 2314. Specifically, they point out that it fails to allege "unlawful or fraudulent in-

---

[2] Count 5 (formerly count 13):

"THE GRAND JURY FURTHER CHARGES:

"That on or about the 22nd day of June, 1971, in the Eastern District of Virginia, Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio, and Charles J. Piluso did transport and cause to be transported in interstate commerce from Arlington, Virginia to Philadelphia, Pennsylvania, falsely made, forged, altered and counterfeited securities, that is, Certificates Nos. 1, 2 and 3 of the Zachary Taylor Corporation certifying that as of the 5th day of January 1970, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO, respectively, were each the owners of ten (10) fully-paid and unassessable shares of the capital stock of said corporation knowing the same to have been falsely made, forged, altered and counterfeited.

"(Violation of Title 18, United States Code, Sections 2314 and 2)"

tent,"[3] citing *United States* v. *Beard,* 414 F.2d 1014 (3rd Cir. 1969).

When an indictment does not accurately and clearly allege all th ingredients of which the offense is composed, we have held it to be insufficient. *Hale* v. *United States,* 89 F.2d 578 (4th Cir. 1937). Since we reverse and remand this case for a new trial, and are of opinion that count 5 of the indictment is insufficient on its face, we do not reach the questions of whether the objection comes too late, or the defect was cured by instructions, and direct that count 5 of the indictment be dismissed without prejudice to the government to reindict and retry if it chooses. *United States* v. *Ball,* 163 US 662, 672 (1896); *Beard,* p. 1017.

REVERSED and REMANDED FOR A NEW TRIAL.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1690

UNITED STATES OF AMERICA

Appellee

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES PILUSO

Appellants

Order

The United States has filed a petition for rehearing suggesting consideration en banc; the defendants Louis J. Pomponio and Charles Piluso have filed a petition for rehearing directed only to the panel; and the defendants

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[3] "Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited. . . ." 18 USC § 2314.

Peter Pomponio and Paul Pomponio have filed a petition for rehearing directed only to the panel.

No member of the court has requested a poll of the court on the suggestion of the United States for en banc consideration.

We have considered the three petitions for rehearing and are of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions shall be, and the same hereby are, denied.

With the concurrences of Judge Russell and Judge Field.

T. H. EWAD (illegible)
For the Court

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk
By F. O. CHLORIE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Criminal No. 303-73

UNITED STATES OF AMERICA

v.

LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, CHARLES J. PILUSO

JULY 1972 SPECIAL TERM — At Alexandria

THE GRAND JURY CHARGES:

A. 1. That at all times material herein, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO were brothers and developers, builders, owners and operators of high-rise office and apartment buildings in Northern Virginia and the District of Columbia, which they accomplished through a

network of closely-held family corporations, partnerships and other business entities and in association with CHARLES J. PILUSO, an attorney, all of whom sometimes referred to each other as "partners," which network is described as follows:

a. National Realty and Construction Company, Inc. (NR&CC) operated as the general contractor for constructing the buildings.

b. Art Electric Company, Inc., Atlantic Mechanical Contractors, Inc., Dynner Window Wall Corporation, K. M. Adams of Virginia, Inc., National Elevator Corporation, Rosslyn Construction Company, Inc. and Watson Equipment Company, Inc. were subcontractors through which National Realty and Construction Company, Inc. accomplished the construction of the buildings.

c. A & H Holding Corporation, Abingdon Realty Corporation, Alexandria Overlook Apartments, Inc., Casimir Pulaski Corporation, Chester Arthur Corporation, Chowning Development Corporation, Christopher Wrenn Corporation, Columbia Plaza Corporation, Donata Corporation, Federal Realty and Development Corporation, Franklin Pierce Corporation, Howard Detrick Corporation, James Buchanan Corporation, James Polk Corporation, Lynn Equipment Company, Inc., Martin Van Buren Corporation, Millard Fillmore Corporation, Mutual Investors, Inc., National Center Corporation, Rosslyn Development Company, Inc., Rutherford Hayes Corporation, Winfield Corporation and Zachary Taylor Corporation were land and building owning corporations which obtained the financing and contracted for the construction of the buildings.

d. Pomponio Brothers Realty and Construction Company, Inc. (PBR&CC) provided management and leasing services for the completed buildings, Commonwealth Parking Corporation serviced the parking facilities in the completed buildings, Pomponio Financial Corporation provided man-

agement services, such as, payment of executive salaries and providing automobiles and drivers for officers and executives, and Rosslyn Aviation Corporation provided the transportation services of a jet airplane to the said executives and officers.

e. Eastland Capital Corporation and Margate Capital Corporation were formed in 1962 and 1963, respectively and operated as Small Business Investment Companies (SBIC) until October 18, 1967 when they agreed to cease in all respects to operate as such and to change their corporate names to Eastland Corporation and Margate Corporation, respectively.

2. That at all times material herein, the Royal National Bank, New York, New York was a federally insured bank engaged, among other things, in making construction loans for large commercial projects, such as high-rise office buildings.

3. That Jerome S. Murray duing the times material herein was self-employed as an owner and developer of real estate in the Washington, D. C. Metropolitan Area.

4. That Albert Ginsberg at all times material herein was self-employed as a builder, owner and developer of office buildings and other real estate in New York and the Washington, D. C. Metropolitan Area.

5. That John McShain during the times material herein, was a builder, owner and developer of large real estate projects in Philadelphia, Pennsylvania, Washington, D. C. and elsewhere.

B. That from on or about the 14th day of November 1968 and continuing thereafter up ton and including the date of the return of this Indictment, within the Eastern District of Virginia and elsewhere, Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio and Charles J. Piluso, herein named as defendants, knowingly, willfully and unlawfully devised and intended to devise a scheme and arti-

fice to defraud Royal National Bank of New York, Jerome S. Murray of Annapolis, Maryland, Albert Ginsberg of New York, John McShain of Philadelphia, Pennsylvania, Continental Bank & Trust Company of Philadelphia, Cabot, Cabot & Forbes Land Trust Company of Philadelphia, and others to the Grand Jury unknown, each and all of whom were members of and constituted that class of persons and firms (hereinafter referred to as "lenders and investors") who could be induced to provide money and property for use by corporations owned and controlled by the defendants and engaged in construction projects in Northern Virginia and the District of Columbia; and for obtaining money and property from said lenders and investors by means of false and fraudulent pretenses, representations and promises, which the defendants well knew would be and were false when made; which scheme and artifice to defraud and for obtaining money and property as aforesaid was in substance as follows:

1. The defendants, builders and owners of high-rise office buildings, established a self-contained and integrated organization of closely-held corporations, with separate companies set up to own and obtain financing from lenders and investors for their construction projects, to act as general contractors and subcontractors for these projects, and to manage and operate the completed projects.

2. It was a part of the said scheme and artifice that the defendants would and did use this family owned and controlled organization to facilitate the manipulation and diversion of money obtained from lenders and investors for one of the defendants' projects to other projects of the defendants and to the defendants personally, all for the personal use and benefit of the defendants.

3. It was a further part of the said scheme and artifice that the defendants would and did give as consideration and security for these loans or investments, in various combinations, deeds, leases, sale/leaseback commitments, notes

and deeds of trust on assets of certain of defendants' corporations, asignments of all of the defendants' stockholdings and pledges of the defendants as sole shareholders not to issue more stock or encumber transfer any of the assets of these certain corporations.

4. It was further part of the said scheme and artifice that the defendants would and did bribe and attempt to bribe fiduciaries of the lenders and investors with whom they were dealing by giving them automobiles, vacation trips and large payments, calling them variously "gifts" or "consulting fees."

5. It was a further part of the said scheme and artifice that the defendants, for the purpose of misleading and with the intent to mislead the lenders and investors, to persuade them to lend and invest funds in the defendants' projects and to lull them into false senses of security, would and did make and cause to be made false and fraudulent pretenses, representations and promises, well knowing at the time made that they would be and were false when made, including the following:

a. That the funds obtained would be used only for the specific project and purpose for which they were lent and invested.

b. That the asserted progress of construction of specific projects was greater than the actual progress.

c. That the stock the defendants assigned as security for these funds was all that was issued and outstanding and was free and clear of any encumbrances.

d. That the assets securing said funds by deeds of trust were not subject to any other liens, charges, encumbrances or security interests.

e. That the assets directly and indirectly securing said loans and investments were in fact owned by the defendants through one or more of their corporations.

f. That the defendants had certain commitments, including leases, from third parties, the proceeds of which could be used to pay off the loans and investments.

6. On or about June 11, 1971, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises, and attempting to do so, knowingly, willfully and unlawfully did place and cause to be placed in authorized depository for mail matter a letter addressed to Paul Fry, Secretary-Treasurer, John McShain, Inc., 17th and Spring Garden Streets, Philadelphia, Pennsylvania, from CHARLES J. PILUSO, 1925 N. Lynn Street, Arlington, Virginia, to be sent and delivered by the Post Office Department according to the directions thereon.

(Violation of Title 18, United States Code, Sections 1341 and 2).

COUNTS 2 THROUGH 5

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this Indictment except those contained in the last paragraph thereof.

2. That on or about the dates hereinafter specified in Counts 2 through 5, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises and attempting to do so, knowingly, willfully and unlawfully did take and receive and cause to be taken and received from the mails letters which had been delivered by the Post Office Depart-

ment and the Postal Service addressed as specified in Counts 2 through 5:

Count	Date	Addressee	Sender
2	4/3/69	Martin Van Buren Corp. 1925 N. Lynn Street Arlington, Virginia 22209	Royal National Bank New York, N. Y.
3	4/2/71	Charles J. Piluso 1925 N. Lynn Street Arlington, Virginia 22209	Charles Zwiaznick New York, N. Y.
4	4/9/71	Rosslyn Development Co., Inc. 1925 N. Lynn Street Arlington, Virginia 22209	The First National Bank & Trust Co. of Ellenville Ellenville, N. Y. 12428
5	8/26/71	James Polk Corp. & Zachary Taylor Corp. c/o Louis J. Pomponio, Jr. Pomponio Bros. Realty & Construction Co., Inc. 1925 N. Lynn Street Arlington, Virginia 22209	Harold C. McKenna Cabot, Cabot & Forbes Land Trust 28 State Street Boston, Mass. 02100

(Violation of Title 18, United States Code, Sections 1341 and 2)

COUNT 6

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this indictment except the last paragraph theerof.

2. That on or about the 15th day of August, 1972, in the Eastern District of Virginia, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, having devised and intending to devise the aforesaid scheme and artifice to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, did cause to be transported and induce to travel in and to be transported in interstate commerce,

from Annapolis, Maryland to Arlington, Virginia, Jerome S. Murray in execution and concealment of the aforesaid scheme and artifice to defraud the said Jerome S. Murray of property having a value in excess of $5,000, that is, $3,534,800.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 7

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of Paragraphs A and B of the First Count of this indictment except the last paragraph thereof.

2. That on or about the 8th day of April 1971, the defendants, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO, and CHARLES J. PILUSO, having devised and intending to devise the aforesaid scheme and artifice to defraud, and for obtaining money by false and fraudulent pretenses, representations and promises, did cause to be transported and induce to travel in and to be transported in interstate commerce Albert Ginsberg, to-wit: from New York, State of New York, to Arlington, Commonwealth of Virginia in execution of the aforesaid scheme and artifice to defraud the said Albert Ginsberg of property having a value in excess of $5,000, to-wit: $1,750,000.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNTS 8 AND 9

THE GRAND JURY FURTHER CHARGES:

1. And realleges and incorporates by reference all the allegations of the First Count of this Indictment except those contained in the last paragraph thereof.

2. That on or about the dates hereinafter specified in Counts 8 and 9, in the Eastern District of Virginia, LOUIS

J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining property and money by false and fraudulent pretenses, representations and promises, and attempting to do so did transmit and cause to be transmitted in interstate commerce by means of wire communications, that is, telephone communications, certain signs, signals and sounds between Arlington, Virginia and the cities and states specified in Counts 8 and 9:

Count	Date of Phone Call	City and State
7	June 13, 1971	Philadelphia, Pennsylvania
8	August 27, 1971	Boston, Massachusetts

(Violation of Title 18, United States Code, Sections 1343 and 2)

COUNT 10

THE GRAND JURY FURTHER CHARGES:

That on or about the 8th day of April, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO did transport and cause to be transported in interstate commerce from Arlington, Virginia to New York, New York, securities and moneys of a value in excess of $5,000, to-wit: two checks, each dated April 7, 1971, each made payable to "Charles J. Piluso, Attorney" and each signed by Albert Ginsberg, one in the amount of $1,650,000 drawn on the account of Algin Management at the Royal National Bank of New York (No. 2485) and the other in the amount of $100,000 drawn on the account of Algin Management at the Chase Manhattan Bank (No. 1937), knowing the same to have been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

Count 11

The Grand Jury Further Charges:

That on or about the 28th day of June 1971, in the Eastern District of Virginia, Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio and Charles J. Piluso, did transport and cause to be transported in interstate commerce from Philadelphia, Pennsylvania to Arlington, Virginia, securities and moneys of a value in excess of $5,000, to-wit: a cashier's check, No. 408628, dated June 28, 1971 of the Continental Bank, Philadelphia, Pennsylvania, payable to Louis J. Pomponio, Jr., Peter Pomponio and Paul Pomponio in the amount of $2,000,000 knowing the same to have been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

Count 12

The Grand Jury Further Charges:

That on or about the 9th day of September, 1971, in the Eastern District of Virginia, Louis J. Pomponio, Jr., Peter Pomponio, Paul Pomponio and Charles J. Piluso, did transport and cause to be transported in interstate commerce from Boston, Massachusetts to Arlington, Virginia securities and moneys of a value in excess of $5,000, to-wit: a wire transfer in the amount of $3,900,000 from the account of Cabot, Cabot & Forbes Land Trust at the First National Bank of Boston to the account of Alexander Title Agency, Inc. at the Arlington, Virginia Branch of the American Bank (now known as the Bank of Virginia-Potomac), knowing that a substantial portion thereof had been obtained by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 13

THE GRAND JURY FURTHER CHARGES:

That on or about the 22d day of June, 1971, in the Eastern District of Virginia, LOUIS J. POMPONIO, JR., PETER POMPONIO and CHARLES J. PILUSO, did transport and cause to be transported in interstate commerce from Arlington, Virginia to Philadelphia, Pennsylvania, falsely made, forged, altered and counterfeited securities, that is, Certificates Nos. 1, 2 and 3 of the Zachary Taylor Corporation certifying that as of the 5th day of January, 1970, LOUIS J. POMPONIO, JR., PETER POMPONIO and PAUL POMPONIO, respectively, were each the owners of ten (10) fully-paid and unassessable shares of the capital stock of said corporation, knowing the same to have been falsely made, forged, altered and counterfeited.

(Violation of Title 18, United States Code, Sections 2314 and 2)

COUNT 14

THE GRAND JURY FURTHER CHARGES:

That prior to November 14, 1968 and continuously thereafter until up to and including the date of the return of this Indictment, within the Eastern District of Virginia and elsewhere, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO, the defendants herein, willfully, knowlingly and unlawfully did combine, conspire, confederate and agree together with each other and with divers other persons to the Grand Jury unknown, to commit the following offenses against the United States:

1. To knowingly use the mails and cause the use of the mails in furtherance and execution of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 1341;

2. To knowingly transmit and cause to be transmitted by means of wire, radio and television communications in interstate commerce writings, signs, signals, pictures and sounds in furtherance and execution of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 1343;

3. To knowingly transport, cause to be transported and induce persons to travel in or to be transported in interstate commerce in furtherance, execution and concealment of a scheme and artifice to defraud those persons and for obtaining money and property from said persons having a value of $5,000 or more by means of false and fraudulent pretenses, representations and promises in violation of Title 18, United States Code, Section 2314, paragraph two:

4. To willfully transport and cause to be transported in interstate commerce securities of a value of $5,000 or more, each of said defendants well knowing at the time that said securities had been obtained by fraud in violation of Title 18, United States Code, Section 2314, paragraph one;

5. To unlawfully and with fraudulent intent transport and cause to be transported in interstate commerce falsely made, forged, altered and counterfeit securities, each of said defendants well knowing the same to have been falsely made, forged, altered and counterfeited in violation of Title 18, United States Code, Section 2314, paragraph three;

The aforesaid scheme and artifice, false pretenses, representations and promises, use of the mails, wire, radio and television communications, and interstate transportation of persons, of securities obtained by fraud and of falsely made, forged, altered and counterfeited securities are fully set forth and described in the previous Counts of this Indictment, which description is incorporated by reference and made a part of this Count as though more fully set forth and described herein.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

1. The said defendants did do and cause to be done the acts set forth in the preceding counts of this Indictment on the dates, at the places and in the manner therein set forth, all of which are incorporated herein by reference as though fully set forth and made a part hereof.

2. On or before October 19, 1970, CHARLES J. PILUSO represented to the Royal National Bank that the $2,700,000 loan to the Virginia Corporation was an "interim land loan" to acquire the 6th and D Land which would be consolidated into a construction loan for a greater amount, the entire proceeds of which were to be held in trust and used by Virginia solely to obtain the land and construct on it a building.

3. On or about October 21, 1970 the defendants paid $25,000 to Sidney M. Zneimer, the senior bank official at Royal National Bank handling the interim land loan.

4. From on or about October 21 through October 29, 1970, the defendants diverted and caused to be diverted approximately $1,377,000 of the $2,700,000 loan to The Virginia Corporation to other corporations of the defendants POMPONIO.

5. On or about November 6, 1970 and January 13, 1971, LOUIS J. POMPONIO, JR. filed and caused to be filed with Royal National Bank financial statements of The Virginia Corporation falsely representing that it owned the 6th and D Land free and clear, subject only to a mortgage note payable.

6. On or about April 8, 1971, LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO executed an affidavit in which they swore that each was the

beneficial legal and record owner of twenty shares of the common capital stock of The Virginia Corporation and that there was no other outstanding or issued stock.

7. On or about April 8, 1971, PAUL POMPONIO certified under seal that there were then issued and outstanding only eighty shares of stock of The Virginia Corporation which were owned beneficially and of record twenty shares each by LOUIS J. POMPONIO, JR., PETER POMPONIO, PAUL POMPONIO and CHARLES J. PILUSO.

8. On or about April 8, 1971, the defendants would and did issue and cause to be issued duplicate capital stock certificates of Virginia Nos. 1, 2, 3 and 4, of twenty shares each issued to LOUIS J. POMPONIO, JR., PETER POMPONOI, CHARLES J. PILUSO and PAUL POMPONIO, respectively, and assigned them to PHB Associates.

9. On or about April 8, 1971, the defendants received from Albert Ginsberg two checks totalling $1,750,000 payable to "Charles J. Piluso, Attorney."

10. On or about April 9, 1971, CHARLES J. PILUSO deposited the $1,750,000 received from Ginsberg in the account of Rosslyn Development Corporation.

11. From on or about April 9 through April 13, 1971 the defendants caused Rosslyn Development Corporation to disburse $1,270,000 to other corporations of the defendants.

12. On or about June 22, 1971, the defendants POMPONIO assigned Commitment No. 2571 of Eastland Capital Corporation to John McShain.

13. On or about June 28, 1971 the defendants delivered to John McShain and his attorney, Warren Spalding, a pledge agreement executed under seal by LOUIS J. POMPONIO, JR., PETER POMPONIO, and PAUL POMPONIO as the sole shareholders of the Zachary Taylor Corporation warranting that the thirty shares they were assigning to John McShain constituted 100% of the issued and outstanding

capital stock of the Zachary Taylor Corporation, and duplicate capital stock certificates of Taylor, Nos. 1, 2 and 3.

14. On or about June 28, 1971 the defendants received a $2,000,000 treasurer's check from the Continental Bank and Trust Company of Philadelphia.

15. From on or about June 29 through about December 31, 1971, LOUIS J. POMPONIO, JR., PETER POMPONIO and CHARLES J. PILUSO used over $1,800,000 of the $2,000,000 obtained through John McShain for the construction, maintenance and repair of their homes.

16. On or about August 18, 1971, LOUIS J. POMPONIO, JR. submitted to Cabot, Cabot & Forbes Land Trust an affidavit certifying to the leasing of the Zachary Taylor Building.

17. On or about September 9, 1971, the defendants caused ACMI to convey the land under the Zachary Taylor Building to Cabot, Cabot & Forbes Land Trust.

(Violation of Title 18, United States Code, Section 371)

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-413

LOUIS J. POMPONIO, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's convictions on mail fraud and related charges were reversed on appeal. He contends that further review is warranted because the court of appeals did not decide whether the evidence was sufficient to support his conviction on one count of the indictment and whether the evidence was at variance with the charges contained in three additional counts. Petitioner also contends that the court of appeals should have reviewed the conduct of the trial judge

and, in the event a retrial were permitted, issued certain instructions to guide that trial.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on all counts of a five-count indictment charging him with mail and wire fraud and with interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 1341, 1343 and 2314.[1] He was sentenced to concurrent terms of two years' imprisonment. The court of appeals (Pet. App. 1a-6a) reversed the convictions of petitioner and his three co-defendants and remanded for a new trial because the trial court had not questioned the jurors concerning their possible exposure to prejudicial newspaper publicity that had appeared during the

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[1] Count I of the indictment charged mail fraud, in violation of 18 U.S.C. 1341; Count II charged that petitioner and his co-defendants had caused a victim to travel interstate in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314; Count III charged that petitioner and his co-defendants had used an interstate communications facility in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343; Count IV charged interstate transportation of a security obtained by fraud, in violation of 18 U.S.C. 2314; and Count V charged interstate transportation of counterfeit securities, in violation of 18 U.S.C. 2314 (Pet. App. 2a).

Petitioner was tried with three other persons, one of whom (Charles Piluso) was also convicted on all five counts of the indictment. The remaining co-defendants (Paul and Peter Pomponio) were convicted on Counts IV and V and acquitted on Counts II and III. The jury was unable to reach a verdict with respect to Paul and Peter Pomponio on Count I, which was then dismissed by the trial court as to them (Pet. App. 2a).

trial, as required in that circuit by *United States* v. *Hankish*, 502 F.2d 71 (C.A. 4).[2]

The court of appeals did not reach other issues, including (1) whether the evidence relevant to Counts I, II and III varied from the allegations contained in the indictment, (2) whether the evidence relevant to Count IV was sufficient to support petitioner's conviction on that count, (3) whether certain comments made by the trial judge improperly prejudiced petitioner's defense, and (4) whether certain charts were properly admitted into evidence. Petitioner contends that the court of appeals, by declining to reach these issues, failed to meet its responsibilities under 28 U.S.C. 2106[3] and subjected him to retrial in potential violation of the constitutional prohibition against double jeopardy.[4] These contentions are without merit.

Although two of petitioner's co-defendants (Peter and Paul Pomponio) argued in the brief filed by them

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[2] The court of appeals also held Count V insufficient on its face and dismissed it without prejudice (Pet. App. 5a-6a).

[3] 28 U.S.C. 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[4] Charles Piluso has not petitioned for a writ of certiorari. Paul and Peter Pomponio have petitioned in No. 75-379, raising issues similar to those raised here by Louis Pomponio.

in the court of appeals (pp. 18-58) that the evidence at trial was insufficient to support their convictions on Count IV and that the evidence concerning that count varied from the allegations in the indictment, petitioner did not join in that challenge. In fact, the only discussion in the extensive brief filed by petitioner in the court of appeals that arguably can be construed as part of a variance or insufficiency argument appeared in a footnote on the last page of the brief (p. 148, n. 59), where petitioner urged the court of appeals to direct the district court to dismiss Counts I and III of the indictment on the ground that the acts charged in those counts had taken place after the underlying scheme had already been consummated, and as part of an argument relating to the adequacy of the trial court's instructions to the jury (*id.* at 124-131). The variance and sufficiency of the evidence arguments being made by petitioner in this Court are significantly different from any arguments made by petitioner in the court of appeals, and, as a consequence, the court of appeals can hardly be said to have failed to meet its responsibilities under 28 U.S.C. 2106 in not considering them.[5]

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[5] As discussed in our memorandum in opposition in No. 75-379 (*Paul Pomponio and Peter Pomponio* v. *United States*), even if petitioner had raised in the court of appeals the sufficiency of the evidence and variance issues he has raised in this Court, the court of appeals would not have had an absolute obligation to consider them given its reversal of petitioner's convictions on other grounds urged by him.

Petitioner did argue in the court of appeals that certain comments made by the trial court had improperly prejudiced his defense and that the trial court had erred in admitting into evidence a series of charts offered by the government (Br. 83-91). But petitioner also raised a multitude of other issues in his brief, including whether the trial court had erred in its handling of assertedly prejudicial publicity that had appeared during the trial (*id.* at 57-63). Specifically, petitioner argued that the trial court's refusal to question the jurors concerning their possible exposure to certain newspaper articles that had appeared during the trial required that his conviction be reversed "and the case remanded for a new trial" (*id.* at 148). The court of appeals agreed that, under *United States* v. *Hankish*, *supra*, the trial court should have questioned the jurors during the trial to ascertain whether they had read any of the articles that had been brought to the court's attention. It therefore afforded petitioner the relief he sought, reversing his conviction and remanding the case for a new trial.

Petitioner was entitled to no more. Even if the court of appeals had reviewed the comments of the trial judge complained of by petitioner and the issue raised by him concerning the admissibility of certain evidence, and had reversed on those grounds, such rulings would have afforded no reason for the court not to remand the case for a new trial. *United States* v. *Ball*, 163 U.S. 662, 672. Although courts of appeals are often warranted in reaching issues pre-

sented on appeal that are likely to arise again at the retrial, the decision to do so is a matter committed to the sound discretion of the court under 28 U.S.C. 2106. Petitioner has failed to establish that the court abused that discretion in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596999 116